April 10, 2018

The Honorable Rick Jones, Chair of the Senate Committee on Judiciary
Members of the Senate Committee on Judiciary

HB 5407 (Hughes), as introduced, would amend the William Van Regenmorter Crime Victim's Rights Act to require a defendant's presence when a crime victim orally presents his or her victim impact statement at the time of sentencing. The bill would apply to felonies, certain juvenile offenses, and a limited number of misdemeanors.

The bill was introduced in reaction to a Muskegon case where the defendant was allowed to exit the courtroom to avoid hearing a victim impact statement.

I testified in support of HB 5407 as introduced when this bill came up in House Law & Justice. Unfortunately, however, the House adopted floor amendments to **HB 5407** that cause me to oppose the bill in current form.

Some history and context for why the original version is worthy of your support and why the current form is not.

I worked closely with then-Rep. William Van Regenmorter on the original Crime Victim's Rights bill that became 1985 PA 87. Central to his objective of rights for victims was the victim impact statement at sentencing. There was no video-conferencing in those days and the assumption, expectation, and reality of sentencing were that the defendant was present at the time the victim made his or her oral impact statement at sentencing. HB 5407 as introduced reinforces that premise.

Two years ago, the Michigan Supreme Court considered a set of court rules to expand the use of video-conferencing in all manner of judicial proceedings, including felony sentencing [**ADM File No. 2013-18,** released for comment March 23, 2016]. I was the first to file a written objection to proposed Subrule **MCR 6.006(D)**.

I contended then – and still do in support of the original HB 5407 – that Subrule 6.006(D) would run counter to the first sentence in MCL 780.765 (the first section HB 5407 amends) and subvert the right of the victim (or the statutory substitute) to make an oral victim impact statement before the judge and defendant at sentencing:

"The victim has the right to appear and make an oral impact statement at the sentencing of the defendant. …" [See also Mich Const, Art I, Sec. 24(1).]

The defendant may not want that experience and would prefer not to be present for the victim's statement, as in the Muskegon case. The defendant ought not to have the choice to not be present for sentencing. Whether the defendant (with or without concurrence of the prosecution or judge) chooses to waive an in-court appearance for felony sentencing is not his or her decision to make.

But I cited other reasons for not allowing the defendant to be absent from the courtroom at sentencing. Sentencing is more than just *a* critical stage of the process – it is the ultimate decision. Neither the defendant nor the judge should be insulated from the consequence of that decision. Electronic substitutes effectively insulate participants. Under the guise of efficiency and economy, we should not further depersonalize and mechanize our system of justice for those who too often feel marginalized and disconnected from it already. It is in the better interest of society if the individual convicted of a felony (or felonies) faces the judge imposing the sentence in open court before whatever public chooses to attend. It also reinforces accountability for the judge. Is it easier to impose incarceration if a defendant is not in front of the bench?

The defense also had valid concerns against Subrule (D). The use of video-conferencing for felony sentencing could negatively impact the defense attorney's ability to adequately represent his or her client, including raising objections to the presentence report and the scoring of guidelines. Where is the defense attorney – with the defendant at the jail or prison site, or in court with the judge without confidentiality to consult with his or her client? Defense will certainly assert that the defendant has the right to attend every stage of the criminal proceeding, including the full sentencing stage – and that right is not subject to whether a victim wishes the defendant to be absent.

While ADM File No. 2013-18 was pending, the Michigan Court of Appeals ruled in People v Heller (Docket #326821) in July that the Supreme Court did not provide for video-conferencing for sentencing a person for a felony. When the Supreme Court issued its final set of video-conferencing rules on September 21, 2016, the Court did not alter the effect of Heller and the **proposed MCL 6.006(D) was NOT included**.

To the extent that the Muskegon case was based on a belief that there was no specific rule or statute requiring defendant's presence at sentencing, HB 5407 as introduced certainly would fill in that perceived gap and leave no doubt – reinforcing all the reasons why defendant must be present for felony sentencing.

Now we come to HB 5407 as amended by the House. The following is the pending language applicable to felony sentencing (with comparable provisions applying to juvenile violations and misdemeanor sentencing):

'(2) UNLESS THE COURT HAS DETERMINED, IN ITS DISCRETION, THAT THE DEFENDANT IS BEHAVING IN A DISRUPTIVE MANNER OR [*] PRESENTS A THREAT TO THE SAFETY OF ANY INDIVIDUALS PRESENT IN THE COURTROOM, THE DEFENDANT MUST BE PHYSICALLY PRESENT IN THE COURTROOM AT THE TIME A VICTIM MAKES AN ORAL IMPACT STATEMENT UNDER SUBSECTION (1). **[IN MAKING ITS DETERMINATION UNDER THIS SUBSECTION, THE COURT SHALL CONSIDER A VICTIM'S PREFERENCE ON THE DEFENDANT BEING PHYSICALLY PRESENT DURING THAT VICTIM'S ORAL IMPACT STATEMENT.]'.**

[*Stricken by floor amendment from original bill was the phrase "IN A MANNER THAT".]

That new sentence would seem to allow the victim to have a say as to whether the defendant was to be in the courtroom when a victim impact statement was made. There may be some ambiguity here. While the new language seems to be limited to removal for reason of disruptive behavior or threat, that doesn't make much sense. I could foresee an interpretation that applies the victim's preference to defendant's presence more broadly. I support victim's rights – but I respectfully suggest defendant's attendance is not the victim's call nor is the victim's preference for defendant's attendance a relevant consideration.

Those floor amendments cause a fundamental problem beyond the victim impact statement and conflict with the state Supreme Court's determination NOT to authorize video-conferencing for felony sentencing, and by implication not allowing defendant's removal from the courtroom at sentencing. **Defendant needs to be in that courtroom.**

One cautionary note: HB 5407 conflicts with current court rules on juveniles and misdemeanors that permit video-conferencing at sentencing or disposition. Conversations should begin with Supreme Court Counsel to reconcile the court rules with HB 5407, or those court rules may override what you are trying to achieve in MCL 780.793 and 780.825.

I urge the Senate Judiciary Committee to remove the 3 problematic House amendments and report HB 5407 with a substitute close to the bill as introduced. That would be a worthy bill.

I understand the Committee will also be asked to remove the effective date, so bill can take effect immediately upon signing and filing. However, that does not answer the second and often overlooked question: How does this apply to a case in progress? What about a trial already begun? Does it apply for sentencing even if trial has begun? An enacting section should be added to answer that question so there are not unnecessary motions and challenges raised for lack of legislative guidance. If the bill is intended to apply to pending cases where sentencing has not yet occurred, bill should say that.

Respectfully,

Bruce A. Timmons

Bruce A. Timmons

18ahb5407-04-10-18